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No. 00-1608

In The

Supreme Court of the United States

MOUNTAINEER COAL DEVELOPMENT COMPANY,
d/b/a Marrowbone Development Company,
a West Virginia corporation,

Petitioner,

v.

RADEC, INC., a West Virginia corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

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RESPONDENT'S OBJECTION TO CONSIDERATION OF QUESTION OF WHETHER THERE WAS A DENIAL OF DUE PROCESS BASED UPON AN INADEQUATE INSTRUCTION ON PUNITIVE DAMAGES

Petitioner Marrowbone bases its argument that it was denied due process of law on the absence of a *Garnes* instruction that it fought to keep out. Marrowbone failed to offer a *Garnes* instruction to the court, failed to object to the fact that the *Garnes* factors were not in the punitive damages section of the court's proposed charge, and *specifically objected* to the jury being instructed on the *Garnes* factors when Respondent Radec offered such an instruction. Therefore, Radec objects to consideration of the question on appeal as to whether Marrowbone was denied due process of law due to the lack of adequate constraints on the punitive damages award.

More specifically, no instruction on punitive damages was offered at any point by Marrowbone. The issue of a punitive damage instruction first arose when the trial court gave the parties its proposed charge to review for objections. The charge contained language regarding punitive damages, but did not list the five factors suggested to be given in the case of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Marrowbone objected to the punitive damages portion of the charge, not because of the absence of the *Garnes* factors, but simply because a punitive damages instruction was being given at all. (Resp. App. 1). The court overruled the objection, and made it clear to the parties that because Radec's allegations of fraud were supported by the evidence, the jury would be instructed on punitive damages.

At that point, Marrowbone did not make any further objection to the substance of the charge.

The issue of punitive damages instructions arose again when the parties submitted instructions in addition to the court's charge. Radec submitted Instruction No. 40, a *Garnes* instruction. (Resp. App. 9-11). Marrowbone specifically objected to the *Garnes* instruction offered by Radec stating to the court, "You've covered punitives repeatedly in your charge." (Resp. App. 7). Marrowbone now argues that the failure to give this instruction resulted in a denial of due process due to a "lack of significant constraints."

Marrowbone raised the argument on appeal to the Supreme Court of Appeals of West Virginia. In refusing to address the issue, the court held that "[o]ur cases are clear in holding that '[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.' " (Pet. App. 10a) (citation omitted). The court further noted that, Marrowbone "cannot . . . be allowed to alter retroactively [its] trial strategy." (Pet. App. 10a) (internal quotations and citations omitted). The court agreed that Marrowbone had invited the error and had therefore, waived the issue for appeal.

For these very same reasons, Radec respectfully requests that Your Honorable Court also hold that Marrowbone has waived this issue and may not seek reversal based on that alledged error.

STATEMENT OF THE CASE

Radec, Inc., a contract miner, contracted to mine two mines for Marrowbone in 1991. Those mines later were renamed Radec No. 4 and Radec No. 5. At that time, Radec No. 4 consisted of an area that would take approximately a year and a half to mine. In early 1992, after Radec was already mining Radec No. 4, Marrowbone obtained additional coal reserves adjacent to the coal in the original No. 4 mine. The parties entered a verbal agreement for the additional mining.

The additional reserves caused Radec to be in the new No. 4 mine three years more than originally anticipated. As a result of the delay, the conditions in Radec No. 5 deteriorated drastically. In May of 1995, when Radec was ready to start Radec No. 5, it was clear that a considerable amount of money would have to be spent to rehabilitate it before any coal could be mined. The costs for this extensive rehabilitation work were not part of Radec's original contract on Radec No. 5.

Richard Goff, a member of the family that owned and operated Radec, Inc., realized that Radec would lose money due to costs and time for the extensive rehabilitation in Radec No. 5. Mr. Goff discussed this problem with Marrowbone officer, Howard Epperly. Marrowbone agreed to reimburse Radec its rehabilitation costs, but when Radec submitted its bill to Marrowbone, Marrowbone refused to pay the entire costs, indicating that only certain costs would be covered.

Richard Goff also told Howard Epperly that unless Marrowbone gave Radec another tract of coal to mine to offset expected losses in Radec No. 5, Radec would not be

able to mine Radec No. 5. Pursuant to the terms of the original written contract, Radec could have terminated its obligation to mine by giving thirty-days notice to Marrowbone.

Marrowbone agreed that Radec No. 5 was a losing proposition. Marrowbone also knew that they would have to pay royalties to the landowners for any unmined coal in Radec No. 5. To entice Radec to stay and mine Radec No. 5, Marrowbone offered Radec another seam of coal, the Drautz property. Marrowbone represented that this would be a very profitable mine based upon their studies of the coal. Marrowbone employees took Radec to the property and mapped out with Radec how the mine would be set up; told Radec over and over again that they were getting the permit ready on the property so that Radec could start mining; agreed on a price for Radec to mine; and showed Radec development maps for the property. It is true that Marrowbone was preparing the permit for the Drautz property, but it was also deceptive. Marrowbone was preparing the Drautz permit for mining by a Marrowbone company, not for mining by Radec. Despite numerous discussions over a year and a half between Radec and Marrowbone regarding the Drautz property, Marrowbone did not ever inform Radec that the property was being prepared for another company to mine.

Based upon Marrowbone's deceitful representations that Radec would soon be mining the Drautz property, Radec continued mining and losing money in Radec No. 5. Radec was in such a need for cash to continue mining, that it had to obtain a loan from Marrowbone's parent corporation. Marrowbone made certain it got the money

back by deducting the cost of the loan from Radec's mining recovery. Radec also refinanced all its equipment, but eventually lost the equipment because of its inability to make the loan payments. Radec's need for cash to continue operations in Radec No. 5 became so great that family members took personal loans, pay cuts, went without pay for six months so the employees could be paid, liquidated personal assets, and took loans against their homes. Radec incurred a total debt of $1.1 million dollars.

In September, 1996, just before Radec had finished mining Radec No. 5, Marrowbone's permitting supervisor told Richard Goff in confidence that Radec was not going to mine the Drautz property. Immediately after being told, Richard Goff and Jerry Goff went to Marrowbone's corporate office and confronted officers Larry Jones and Howard Epperly. For the first time Marrowbone denied its oral promises and agreement that Radec would mine the Drautz property. By then, Radec was in a state of financial ruin.

The history between these two companies provides evidence of how Marrowbone knew they could take advantage of Radec. The Goff family had done business with Marrowbone's parent companies on numerous occasions over a twenty year period. Many agreements reached by these two companies were done verbally, with a written embodiment of that agreement following at a later time. Often the written document memorializing the parties' oral contract would be signed after Radec had already started mining. There were also times that nothing written followed the oral contracts entered into by these two companies.

JURY AWARD

Radec alleged two causes of action in its complaint: fraud and breach of contract. Marrowbone raised an objection to instructing the jury on fraud, and was overruled by the court. Radec offered a verdict form that set forth Radec's causes of action separately. Petitioner objected, offering a general verdict form instead. Based upon the general verdict form submitted by Marrowbone, a verdict was returned for Radec in the amount of $89,629.89 in compensatory damages, and $1,541,638.00 in punitive damages. No special interrogatories were requested by Marrowbone.

Marrowbone objected to Radec's specific discovery requests for documents showing Marrowbone's net worth. In order to establish Marrowbone's financial position, Radec had to use data found within other discovery documents produced by Marrowbone. The evidence showed that Marrowbone had grossed over $800,000,000 in sales over a six year period. No evidence was offered by Marrowbone to rebut Radec's evidence.

POST-TRIAL PROCEEDINGS

Marrowbone raised nine issues in its post-trial motions, including a motion for a new trial based on the lack of the *Garnes* instruction, and also filed a motion for the court to have post-trial consideration of the nine *Garnes* factors. A hearing was held on all post-trial motions. Marrowbone was given an opportunity at that

hearing to offer evidence that would mitigate the punitive damages award pursuant to the four post-trial factors listed in *Garnes*. However, Marrowbone opted not to offer any such evidence. After the hearing, the trial court entered a twenty-one page Final Order. The court conducted an independent review of the evidence and found that based upon the fraudulent acts of Marrowbone, the absence of the *Garnes* instruction did not create error that warranted a new trial. In reaching this conclusion, the court specifically set out all nine of the *Garnes* factors and the evidence presented in relation to those factors. The court denied all of Marrowbone's post-trial motions regarding punitive damages finding that, "based upon the evidence of record, the jury's punitive damages award passes the scrutiny of a *Garnes* review." (Pet. App. 32a).

APPELLATE PROCEEDINGS

The Supreme Court of Appeals of West Virginia considered the excessiveness argument by Marrowbone in light of the *Garnes* factors as well. After its independent review of the evidence presented, the court agreed that a punitive damages award seventeen times greater than the compensatory damage award was warranted in this case. The court held in part:

> We agree with Radec that the evidence of Marrowbone's fraudulent conduct warranted the amount of punitive damages awarded in this case. It is clear from the evidence that Marrowbone knew Radec could not survive financially if it rehabilitated and mined Radec No. 5.

> Additionally, Marrowbone plainly knew it would benefit from Radec's work on Radec No. 5. In order to reap this benefit, Marrowbone deceived Radec into believing that it would be given the profitable Drautz property to mine after completing work on Radec No. 5. Marrowbone never intended to turn over the Drautz property to Radec. Marrowbone's actions were "evil" and self-serving.

(Pet. App. 12a-13a).

ARGUMENT

1. MARROWBONE'S ARGUMENTS THAT THE JURY, THE TRIAL COURT AND WV SUPREME COURT ERRED IN FINDING FRAUD AND EVIL INTENT BY MARROWBONE AND DAMAGES BY RADEC, SHOULD NOT BE CONSIDERED BY THIS COURT IN THAT THEY ARE BASED UPON CLAIMS OF ERRONEOUS FACTUAL FINDINGS

Marrowbone alleges in its Petition that the punitive damages award is unconstitutionally excessive since there was no evidence of fraud or evil intent and that Radec did not suffer any damages. However, the Supreme Court of Appeals of West Virginia made specific factual findings in its opinion that contradicts Marrowbone's claims. Marrowbone alleges that "there was no contention that Marrowbone misrepresented any existing fact." (Pet. Brief 10). However, the West Virginia Supreme Court found, "Howard Epperly promised to let Radec mine the Drautz property . . . [but] Marrowbone had never actually considered letting Radec mine the Drautz property." (Pet. App. 7a). Marrowbone argues that,

"Radec also failed to prove any damages resulting from the alleged fraud." (Pet. Brief 10). The court found, however, evidence supported Radec's position that, "Radec was financially ruined as a result of its reliance on Marrowbone's promise to allow Radec to mine the Drautz property. There was evidence that Radec incurred debts totaling $1.1 million dollars." (Pet. App. 7a). Marrowbone further claims in its Petition that "there has never been any contention in this action and no finding in the lower courts of 'concealment of evidence of improper motive,' " and that "[n]o such proof [of malice] exists in the record of this case." (Pet. Brief 11). However, the West Virginia Supreme Court found:

> Marrowbone knew Radec could not survive financially if it rehabilitated and mined Radec No. 5. Additionally, Marrowbone plainly knew it would benefit from Radec's work on Radec No. 5. In order to reap this benefit, Marrowbone deceived Radec into believing that it would be given the profitable Drautz property to mine after completing work on Radec No. 5. Marrowbone never intended to turn over the Drautz property to Radec. Marrowbone's actions were "evil" and self-serving.

(Pet. App. 13a).

Apparently, the reason this case has been presented to this Court is summed up in footnote 3 of Marrowbone's petition which states, "[A] number of the 'facts' upon which the majority's *per curiam* opinion relied in finding evidence of fraud are not facts at all and are not supported by a review of the record." A review of the record clearly negates Marrowbone's position. Regardless, however, Marrowbone fails to recognize that Rule 10

of the Rules of The United States Supreme Court provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . . " Accordingly, Radec respectfully submits that Marrowbone's petition should be denied in such respect.

2. PROCEDURAL SAFEGUARDS ARE IN PLACE IN WEST VIRGINIA, AND WERE FOLLOWED IN THIS CASE TO PROTECT DEFENDANTS AGAINST GROSSLY EXCESSIVE PUNITIVE DAMAGES AWARDS

a. The jury was instructed that it had to find actual malice before punitive damages could be awarded, and Marrowbone waived further instruction on punitive damages at the trial court level by objecting to the *Garnes* instruction.

The law of West Virginia allows for punitive damages "[w]here gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it. . . . " *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996). The court instructed that punitive damages could not be awarded for breach of contract, only for fraud. (Resp. App. 5-6). The jury was further instructed that even if Radec proved all the elements of fraud, Radec was required to prove malice, wanton, willful, or reckless conduct by clear and convincing evidence before punitive damages could be awarded. (Resp. App. 1-2, 6). As discussed above, further instruction on the *Garnes* factors

was objected to by Marrowbone, and, therefore, any error attributed to the lack of a *Garnes* instruction is waived. Syl. pt. 4, *State v. Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996).

b. A thorough and independent review was conducted by the trial court to assess whether the evidence warranted a punitive award, and the evidence was evaluated in light of the *Garnes* factors.

Syllabus Point 7 of *Alkire* provides that West Virginia's "punitive damages jurisprudence"

> includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

Syl. pt. 7, *Alkire v. First Nat'l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

The first mandatory review is conducted by the trial court. The trial court is instructed to review punitive damages "exclusively within the boundaries of Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992)." *Alkire*, 475 S.E.2d at syl. pt. 5. If the trial court fails to conduct an adequate review, the state Supreme Court will not consider the petition, but

will send the case back to the trial court for a thorough analysis of excessiveness. *Id.* at 131.

In its twenty-one page Final Order, the trial court's independent review of the evidence is clear. The order states:

> [T]he Court has undertaken the weighing of the evidence introduced at trial and has considered the credibility of the witnesses. The Court finds the verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice.

(Pet. App. 31a).

The trial court then laid out the *Garnes* factors and summarized the evidence in light of those factors. Based upon its review, the court found " 'clear and convincing' " evidence that Marrowbone "made promises to the Plaintiff with no intention of fulfilling those promises," and that the fraud damages suffered by Radec sufficiently supported the verdict returned in the case. (Pet. App. 31a).

The review by the trial court was met with approval by the Supreme Court of Appeals of West Virginia. As to Marrowbone's argument that it was denied due process based upon an inadequate review by the trial court, the Court held "[w]e disagree with Marrowbone's contention that the order fails to demonstrate a meaningful review. We find the order shows the trial court gave full consideration to the amount of the punitive damage award and the evidence adduced at trial." (Pet. App. 11a).

c. A review of a punitive damages award is mandatory by the Supreme Court of Appeals of West Virginia and upon its review found Marrowbone's conduct to be "evil and self-serving."

The second mandatory review of a punitive damages award is by the Supreme Court of Appeals of West Virginia. The state's highest court conducts an independent review of "the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*." *Alkire v. First Nat'l Bank of Parsons*, 475 S.E.2d 122, 130-131 (1996). Syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), states:

> Upon petition this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

The West Virginia Supreme Court fulfilled its duty of an independent review of the punitive damage award in this case. Under the guidance of the standard enunciated in syllabus point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the court reviewed the evidence and found proof that Marrowbone's conduct towards Radec was "evil and self-

serving." Based upon this intentional, reprehensible conduct, the court upheld the constitutionality of the $1.5 million punitive damages verdict. (Pet. App. 13a).

3. THE PUNITIVE DAMAGES AWARD IN THIS CASE IS NOT EXCESSIVE UNDER THE THREE GUIDEPOSTS IN *BMW V. GORE*

a. The actions of the Marrowbone were evil and self-serving showing a high degree of reprehensibility.

The first "guidepost" in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), is consideration of the degree of reprehensibility of the defendant's conduct. The West Virginia Supreme Court's decision in *TXO* held that in cases of extreme negligence that the outer limit of the ratio of punitive damages to compensatory damages is roughly five to one. However, that rough outer limit applies in cases where there is no actual intention to cause harm. *TXO*, 419 S.E.2d at syl. pt. 15. In the case of *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Court states that the concern in a punitive damages award is that "the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." As explained in *Gore*, " 'trickery and deceit' are more reprehensible than negligence." *Gore*, 517 U.S., at 575 (*quoting TXO*, 509 U.S., at 462, 113 S.Ct., at 2722).

Marrowbone's conduct in this case involved "trickery and deceit," but even went beyond, rising to the level of "evil and self-serving." Marrowbone was aware that

Radec was in a vulnerable financial position. Radec employees testified that they continuously made Marrowbone aware that they were losing money in Radec No. 5, and the reason they needed the Drautz property was to recover their losses. Marrowbone even loaned Radec money during their mining of No. 5. The loan payments were withheld from Radec's mining recovery. Even though Marrowbone knew all along that Radec would not be mining Drautz, and they knew that Radec was falling deeper and deeper into financial trouble, they continued to misrepresent to Radec that the Drautz property was being prepared for them. *Gore* holds that "[t]o be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Gore*, 517 U.S., at 575 (citation omitted). Marrowbone's motive was to get the coal mined in No. 5 so that Marrowbone would not lose money to the mineral owners for unmined coal.

Marrowbone's fraudulent conduct did not stop with false promises to Radec. Two of Marrowbone's witnesses testified at trial that the Drautz property was found not to be profitable to mine and so the permit for the Drautz property was never filed with the DEP. However, Radec's Exhibit 100, a certified copy of the filed application, proved that that permit was filed in 1996.[1] When one of the witnesses who testified that the permit was not filed

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[1] The filed permit was never disclosed by Marrowbone in discovery, even though all such documents were specifically requested, but was discovered just weeks before trial through an independent investigation by Radec's counsel.

was shown the filed application at trial bearing his notarized signature, he denied the signature was his. That permit was originally filed under the name of Marrowbone, but then changed to Heritage Corporation, a subsidiary of Marrowbone's parent corporation.

Unlike BMW's actions in *Gore* where this Court found "none of the aggravating factors associated with particularly reprehensible conduct," *Gore*, 517 U.S., at 559, and, "no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," *Gore*, 517 U.S., at 579, Marrowbone's conduct was fraudulent and deliberately malicious, causing financial ruin to Radec. Marrowbone invited a high award of punitive damages through its "evil and self-serving" conduct.

b. The ratio of 17 to 1 punitive damages to compensatory damages is not excessive in light of the actual harm suffered by Radec and the potential harm that could result from Marrowbone's future fraudulent schemes.

The second inquiry under *Gore* is the ratio of the actual or potential harm to the plaintiff and the punitive damages award. *Gore*, 517 U.S., at 580. Instead of looking only at the dollar amount of the compensatory damage award, this Court confirmed on at least three occasions that "[t]he proper inquiry [of the ratio between compensatory and punitive damages] is ' "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." ' "

Gore, 517 U.S., at 581 (*quoting TXO*, 509 U.S., at 460 (*quoting Haslip*, 499 U.S., at 21)). The Court has made it clear that the numbers themselves that establish the ratio are not the controlling factors, stating "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Gore*, 517 U.S., at 582 (*citing TXO*, 509 U.S., at 458, 113 S.Ct., at 2720). The excessiveness inquiry with regard to the ratio is mostly dependant upon the specific facts of the case. *See, e.g. TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

The jury awarded Radec $89,000 in compensatory damages, an amount equal to the rehabilitation costs that Marrowbone refused to pay Radec. Radec's witnesses also testified that Radec and its family member owners went into debt of over a million dollars for taxes, accumulated bills to their creditors, and from having to refinance their equipment and their homes, all because of the time spent in Radec No. 5.

Radec's accounting expert, Drew Baldock testified as to the net income that Radec would have earned had they actually mined the Drautz property. Based upon the mining projections of mining expert Raymond Brainard, and the past accounting figures for Radec mining a similar block of coal, Mr. Baldock was able to calculate that Radec would have made a profit of .6806 cents a ton on the 2.2 million tons of coal in Drautz for a net profit of approximately 1.5 million dollars. These losses suffered

by Radec were different than an actual out-of-pocket expenditure, but more esoteric and harder for a jury to assess. The Court in *Gore* considered situations, such as the one presented in this case, where the actual damages are difficult to assess. The Court held that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, . . . the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S., at 583. Ironically, the punitive damages award was within less than $50,000 of the amount presented at trial for lost profits.

Gore also suggests that the excessiveness inquiry includes "identification of the state interests that a punitive award is designed to serve." *Gore*, 517 U.S., at 568. The Court found in *TXO*, 509 U.S. 443 (1993), that there is an interest in deterring harm to future victims that could result if defendant's deceitful conduct continued. Contract miners in West Virginia generally have no ownership or leasehold in the lands that they mine. Radec testified that contract miners are typically used by the larger mining companies to mine the more difficult seams of coal that would not be cost effective for the larger companies to mine. The contract miners are traditionally at the mercy of the larger companies. The state has a legitimate interest in deterring Marrowbone from taking advantage of and defrauding other contract miners by engaging in "similar future behavior." *Id.* at 460-461.

When considering all damages to Radec caused by Marrowbone's actions, and the potential damages caused to other West Virginia contract mining companies if Marrowbone were not punished and deterred from future

similar behavior, the ratio between the punitive and compensatory damages is actually less than two to one. Therefore, the punitive damage award in this case is not an indication of excessiveness.

c. West Virginia law against criminal fraud allows for imprisonment up to ten years and more severe sanctions have been approved in West Virginia and by this Court for comparable misconduct in other cases.

The third guidepost to be considered in determining whether the punitive damages award violates the due process clause is a comparison with "civil or criminal penalties that could be imposed for comparable misconduct." *Gore*, 517 U.S., at 583. Under West Virginia Code § 61-3-24(d) [1994], Marrowbone's conduct was criminal. Section 61-3-24(d) provides in part that, "If a person, firm or corporation obtains labor, services or any other such thing of value from another by any false pretense, token or representation, with intent to defraud, the . . . corporation is guilty of theft of services." The statute goes on to say that if the value of the services fraudulently obtained is in excess of $1,000, the violator is guilty of a felony, punishable by imprisonment for up to ten years.

In this case, the losses the jury found that were directly attributable to Marrowbone were awarded in an amount of $89,000, substantially in excess of $1,000. The million dollar debt incurred by Radec as a result of the time spent in Radec No. 5, however, is a reasonably foreseeable loss caused by Marrowbone's fraudulent acts. Incarceration for up to ten years is as severe, if not more

severe than a $1.5 million punitive damages award against a company earning over $800,000,000.00 in gross sales.[2]

The conduct of Marrowbone in this case is not substantially different from that of TXO towards Alliance Resources Corp. In *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), TXO began its endeavor to obtain oil and gas from the Blevins tract as a legitimate business deal, just as Marrowbone did when it entered into the contracts with Radec. However, when the opportunity presented itself for TXO to save itself from losing profits in royalty payments to Alliance, even if the opportunity was through illegal means, TXO set out on a scheme of trickery and deceit to defraud Alliance. Marrowbone saw a similar opportunity. When Radec informed Marrowbone that Mine No. 5 was no longer economical for Radec to mine, Marrowbone recognized that money would be lost to the mineral owners for the unmined coal. At that point Marrowbone lured Radec into mining the coal at a loss through deceit and false promises.

A punitive damages verdict over 500 times greater than the compensatory damages verdict was not found to

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[2] Through discovery Radec obtained figures representing Marrowbone's gross profit from sales of coal from a six year period which included the time period in which Radec was losing money in Radec No. 5. At trial, Marrowbone had an opportunity to rebut the evidence that Marrowbone had grossed over $800,000,000.00 in coal sales, however, they chose not to do so.

be constitutionally excessive in light of TXO's deliberate, malicious acts. Based upon the criminal penalties permitted by law in West Virginia for Marrowbone's conduct and the civil sanctions approved of in this state for comparable civil conduct, the verdict awarded against Marrowbone under all the circumstances in this case is not excessive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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In The Circuit Court of Mingo County, West Virginia

[145] next objection?

MR. BOLEN: The next objection which I would say would be our principle [sic] objection is with regard to instructing the jury on punitive damages. Your Honor, we think the proof in this case doesn't rise to a level that would justify a punitive damage instruction. The law in West Virginia is that in order to secure punitive damages a defendant must be shown to have engaged in a willful, wanton, reckless, malicious act, and if that's true, even in cases where fraud has been alleged, as it has been here, we don't think that this evidence rises to that level.

MR. TAYLOR: We think that is an issue for the jury. Certainly, there is a question whether they intentionally misrepresented and there's a question of whether they recklessly misrepresented and the jury can draw inferences from the total evidence to determine that issue. That's a jury issue, Your Honor.

THE COURT: I agree. Overruled. What about with regard to the apparent or ostensible agency instruction that has been offered by the plaintiff? Any objections to that language? Did you give Mr. Bolen a copy?

MR. TAYLOR: I gave him a copy before the trial, Your Honor.

* * *

[164] the Plaintiff relied upon them, then you must find for the Plaintiff. However, if you find that the Plaintiff has failed to show by clear and convincing evidence any of these elements, then, you must find for the Defendant.

c). Damages. If you find that the Plaintiff has shown by clear and convincing evidence that the Defendant acted with gross fraud, malice, oppression; or with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others, then you may assess punitive damages in addition to compensatory damages. However, if you find that the Plaintiff has met its burden in showing the elements of fraud by the Defendant, but that the Plaintiff failed to show by clear and convincing evidence that the Defendant acted with malice, then you are prohibited from assessing punitive damages and may only award compensatory damages which will be more fully explained to you hereafter.

1). Malice. In order to support a claim for punitive damages in this case, the Plaintiff must establish a high threshold of actual malice. [165] on the part of the Defendant. Actual malice means that the Defendant actually knew that that [sic] its acts or representations were false, but the Defendant nonetheless acted willfully, maliciously, recklessly or intentionally toward the Plaintiff in using those acts or representations to induce Plaintiff into entering a contract. Unless you find that the Defendant willfully, maliciously, recklessly or intentionally made false representations to induce the Plaintiff into entering into a contract, then you may not award punitive damages.

4) Breach of Oral Contract. The Plaintiff has asserted that the Defendant breached its contract with the Plaintiff. A contract is an agreement between competent parties supported by legal consideration and in the form

prescribed by law, creating an obligation on the part of one or both to do or refrain from doing some lawful thing. The essential elements of a contract are offer, acceptance and mutuality of assent.

a). Offer and Acceptance. To constitute a [166] contract there must be an offer and also an acceptance. That is, an offer, in order to become binding between the parties, must be accepted. No contract is created by a mere overture or offer not definitely assented to by both parties.

b). Mutuality of Assent. In addition to an offer and acceptance, mutuality of assent is essential to the creation of a contract. Mutual assent means that the parties to a contract have a meeting of the minds to an agreement. In order that mutuality of assent may exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. Both the offer and acceptance may be by work, actions or conduct which evidences the intentions of the parties to a contract. While an identifiable offer and acceptance are the classic mechanisms for contract formation, manifestation of mutual assent may be made even though neither the offer nor acceptance can be identified and even though the moment of formation cannot be determine. [sic]

[167] c). Mutuality of Obligation. Although the essential elements of a contract are offer, acceptance and mutuality of assent, a contract implies mutual obligations. Mutuality of obligation means that there must be an undertaking on one side and consideration on the other. Consideration is defined to be a benefit to the party promising or a loss or detriment to the party to whom the

promise is made. It is some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by another. Anything which confers a benefit on the party to whom the promise is made or loss or inconvenience on the party making the promise is a valuable and sufficient consideration to support a promise. Therefore, if you the jury find that the Plaintiff, Radec, has shown by a preponderance of the evidence that the Defendant offered to hire the Plaintiff to mine the Drautz property if the Plaintiff continued mining the Radec No. 5 mine at same price paid to the Plaintiff to mine the Radec No. 4 mine for the [168] Defendant, and you find that the Plaintiff accepted this offer, then you may find that a contract existed between the Plaintiff and the Defendant for this purpose. However, if you find that the Plaintiff has failed to meet its burden in proving that the Defendant made this offer, that the Plaintiff accepted Defendant's offer and that the parties mutually assented to this agreement, then you must find for the Defendant.

d). Breach of Contract. The Plaintiff alleges that the Defendant breached its oral contract to hire the Plaintiff to mine the Drautz property after it mined the Radec No. 5 mine at the same price as the Defendant paid Plaintiff to mine the Radec No. 4 mine. A breach of contract is a failure without legal excuse to perform any promise which forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence.

Therefore, if you the jury find by a preponderance of the evidence that the Plaintiff and the Defendant entered

[169] into an oral contract whereby the Defendant agreed to hire the Plaintiff to mine the Drautz property after finishing its mining of Radec No. 5 at the same price paid to Plaintiff for mining the Radec No. 4 mine, and you further find that the Defendant failed to perform in accordance with its contract, then you must find that the Defendant breached its contract and render your verdict in favor of the Plaintiff. However, if you find by a preponderance of evidence that there was no failure to perform, then you may find for the defendant.

5) Damages

(a) When Appropriate. If you find by clear and convincing evidence that the Plaintiff has proven either its claim for fraud or by a preponderance of the evidence its claim for breach of contract, then you may award the Plaintiff damages. The Plaintiff has the burden of proving with reasonable certainty the amount of damages, if any, that it has suffered as a proximate result of the Defendant's actions. You should award the Plaintiff no greater damages than are reasonably certain to [170] compensate the Plaintiff for the damages sustained.

(b) Types of Damages. If you decide to award damages to the Plaintiff, you may consider the following:

i) Damages for Breach of Contract. In a breach of contract action, the Plaintiff, upon meeting its burden of proof, is entitled to compensatory damages. Compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation are those as may be [sic] fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from the breach of the contract itself, or such as

may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach. No punitive damages may be awarded in a breach of contract claim.

ii) Damages for Fraud. The measure of [171] damages in a cause of action in fraud is any injury incurred by the Plaintiff as a result of the Defendant's fraudulent conduct. In addition to full compensation for all injuries directly or indirectly resulting from the Defendant's fraud, punitive damages may be awarded against the Defendant for willfulness, wantonness, and malice of the Defendant's wrong to the Plaintiff. However, punitive damages may only be awarded if you find that the Plaintiff has shown by clear and convincing evidence that the Defendant acted with gross fraud, malice, oppression; or with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others. Only upon a finding by you that the Plaintiff has met this burden of proof may punitive damages be assessed in addition to compensatory damages. If the Plaintiff succeeds in meeting its burden to prove fraud, but fails to show clear [172] and convincing evidence of maliciousness, oppressiveness or wanton, willful, reckless conduct, then you may only award compensatory damages.

C) Closing Instructions

1) Foreperson. Upon retiring to the jury room, you will select one of your number to act as Foreperson. The Foreperson will preside over your deliberations, and will be your spokesperson here in Court

2) Unanimity. Your verdict must represent the considered judgment of each juror. To return a verdict, each juror must agree. Your verdict must be unanimous.

3) Deliberation Process. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest

* * *

[189] Marrowbone a certain sum of money, you may also assess as part of the verdict interest at the legal rate of 10% from the date the money was due until the date of your verdict in this case.

REFUSED: MICHAEL THORNSBURY

THE COURT: Plaintiff's 40?

MR. BOLEN: We object. You've covered punitive damages repeatedly in your charge. We've objected to it, but –

MR. TAYLOR: That's fine, Your Honor. We'll withdraw it.

THE COURT: 40 will be withdrawn. Does that take care of the plaintiff?

MR. TAYLOR: Yes, Your Honor;

THE COURT: All right. Let's do the defendant. Defendant's Instruction 1?

MR. TAYLOR: Your Honor, I think Number 1 is covered; Number 2 is covered; Number 3 is covered, all in the general charge.

THE COURT: Mr. Bolen, do you have anything further to say on Defendant's 1? I think it is covered by the charge.

MR. BOLEN: I didn't pick up that the charge covered the rich or poor aspect of it.

THE COURT: 1 is refused.

IN THE CIRCUIT COURT OF MINGO COUNTY,
WEST VIRGINIA

RADEC, INC., a West Virginia corporation,

Plaintiff,

V. Civil Action No. 97-C-312

HOWARD EPPERLY, LARRY JONES, and MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a MARROWBONE DEVELOPMENT COMPANY, a West Virginia corporation,

Defendants.

PLAINTIFF'S INSTRUCTION NO. 40

(PUNITIVE DAMAGES)

You are instructed that punitive damages may be awarded against a defendant who is found to have acted maliciously, intentionally, willfully, recklessly, or extremely negligent. Such conduct includes actions taken with a conscious disregard or indifference to the rights and obligations of another. A person need not be evil or have acted with an evil purpose or design to have an award of punitive damages entered against him. Maliciousness includes not only mean-spirited conduct but also extremely negligent conduct.

Punitive damages are awarded in addition to compensatory damages and are designed to punish the defendant for committing such acts as well as for the salutary purpose of deterring the defendant and others similarly situated from committing similar acts in the future.

The decision of whether to award punitive damages and the amount of any such award is within your discretion. You are instructed that in determining the amount of any punitive damages award you should consider the following factors:

1. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages;

2. While punitive damages should bear a reasonable relationship to compensatory damages they should also bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous or defendants' actions would likely cause in a similar situation grievous harm, the damages should be greater;

3. You may consider the reprehensibility of the defendant's conduct, including how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him;

4. If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant; and

5. The financial position of the defendant is relevant inasmuch as the wealthier the defendant is the greater the amount of punitive damages should be in order to achieve the desired effect of punishing the defendant and discouraging the defendant from engaging in the same or similar acts in the future.

Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991);

Games v. Fleming Landfill, Inc., 413 S.E.2d 897 (W.Va. 1991); and

TXO Production v. Alliance Resources, 419 S.E.2d 870 (W.Va. 1992).